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No. 90-652

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL J. O'CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to prove that petitioner, a Chicago police officer, induced payoffs "under color of official right" within the meaning of the Hobbs Act, 18 U.S.C. 1951.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 13-16, is reported at 910 F.2d 1466.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1990. The petition for a writ of certiorari was filed on October 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962; and one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to two and a half years' imprisonment on the racketeering conviction and three years' probation on the Hobbs Act conviction. The court of appeals affirmed. Pet. App. 13-16.

1. The evidence at trial showed that petitioner, a Chicago police officer, took several bribes in exchange for information about police activities. The payers of the bribes turned out to be FBI agents conducting an undercover "sting" operation, and this prosecution followed. Pet. App. 13-14; Gov't C.A. Br. 5-12.

In 1986, Special Agent William Lueckenhoff and other undercover FBI agents opened a business in a Chicago warehouse. Agent Lueckenhoff posed as "Bill Burns," a criminal in the business of purchasing stolen vehicles and vehicle parts. Based on information that petitioner had been taking money in return for protection from police activities, Lueckenhoff had a confidential informant arrange a meeting with petitioner. Pet. 3; Pet. App. 13; Gov't C.A. Br. 5.

At the initial meeting, Agent Lueckenhoff asked petitioner whether he could notify him of any police investigations that might affect his stolen parts business. Petitioner responded in the affirmative and described similar tips he had given the confidential informant, who operated a bowling alley that housed an illegal gambling business. As one example, petitioner boasted that he not only provided warning of an upcoming police raid but slipped an overlooked pair of dice into a glass of soda he was drinking so that his fellow officers would not find them. Petitioner reminisced about the "good old days" when he worked on the

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[1] He was acquitted of making a false statement in violation of 18 U.S.C. 1001.

vice squad and repeatedly took illegal payoffs. Pet. App. 13; Gov't C.A. Br. 6.

Upon hearing of petitioner's exploits, Agent Lueckenhoff requested similar assistance for his business. Petitioner agreed to provide it. He assured Lueckenhoff that he would warn him if the police became suspicious of his business and that he could intercede with most of his fellow officers if Lueckenhoff found himself in trouble. Petitioner offered to use his patrol car to transport stolen merchandise safely and agreed to wear a beeper so that Lueckenhoff could easily contact him. Petitioner asked Lueckenhoff how much he would pay for those services. When Lueckenhoff suggested $300 per month, petitioner responded that they "should start at five" hundred dollars per month. Lueckenhoff agreed, provided that he could make the monthly payments in installments. He gave petitioner $300 at once. Over the next two months, Lueckenhoff paid petitioner an additional $650 in four installments. Pet. App. 14; Gov't C.A. Br. 7-8.

During those two months, petitioner provided a steady flow of information to Lueckenhoff. He provided the addresses of individuals who owned cars that Lueckenhoff supposedly wanted to steal. He learned that the confidential informant was a "snitch" and warned Lueckenhoff to avoid the informant. And he described to Lueckenhoff ongoing government investigations of various businesses and assured him that if the police began investigating Lueckenhoff's illegal enterprise, he would "[p]ut the kabosh on it" so that Lueckenhoff would not face criminal charges. Pet. App. 14; Gov't C.A. Br. 8-12.

After two months, Agent Lueckenhoff stopped paying petitioner. Over the next three months, petitioner paged Lueckenhoff repeatedly. Finally, as Lueckenhoff was leaving his business one night, petitioner followed him in a patrol car. Petitioner signaled Lueckenhoff to pull over to

the curb. After Lueckenhoff stopped, petitioner questioned him about where he had been. Lueckenhoff explained that he had not called on petitioner because he had been in the hospital. Lueckenhoff assured petitioner that now that he was well, business would pick up and he would again call on petitioner. Pet. App. 14; Gov't C.A. Br. 11-12.

2. Petitioner moved for a judgment of acquittal at the close of the evidence. On the extortion count, he argued that his conduct did not violate the Hobbs Act because "he never ask[ed] for anything, never demand[ed] anything." Tr. 184. The government replied that it was not necessary for the public official to perform any specific act in exchange for the payment; as long as the payment "is induced by the public official and resulted from the performance of his own duties, that's enough for extortion." Tr. 195.

The district court denied the motion and found petitioner guilty on the extortion and racketeering counts. Explaining its finding of guilt on the extortion count, the court stated that petitioner, "for periodic payments, was going to do a number of different things. One was to keep his eyes open and his ears open at the department to see if there was any heat on the Torrence Avenue operation." Tr. 250. The court explained that petitioner's conduct violated the Hobbs Act because

> [t]he crux of the statut[ory] requirement of "under color of official right" is the public official's use of his office. Here, Lueckenhoff, he set it up that way [an exchange of money for use of official position], that was certainly his intention to convey that message, and that was the message that was conveyed in the other direction.

Ibid.

3. On appeal, petitioner argued that extortion "under color of official right" within the meaning of the Hobbs

Act, 18 U.S.C. 1951, requires proof that the bribe was "induced," and he contended that the evidence in this case failed to establish inducement.[2] In response, the government presented alternative grounds for affirmance. First, the government argued that "[i]n this Circuit, '[e]xtortion "under color of official right" equals the knowing receipt of bribes; they need not be solicited.' " Gov't C.A. Br. 23 (quoting *United States* v. *Holzer*, 816 F.2d 304, 311 (7th Cir. 1987), vacated and remanded on other grounds, 484 U.S. 807 (1988)). Second, and consistent with its position before the district court, the government suggested that petitioner in fact induced the payoffs. "[C]ontrary to his claim, [petitioner] was not simply a passive recipient of Agent Lueckenhoff's bribes", Gov't C.A. Br. 25:

> [Petitioner] did not simply await Agent Lueckenhoff's calls but initiated contact with Agent Lueckenhoff on numerous occasions. [Petitioner's] attempts to reach Agent Lueckenhoff became more and more frequent when Agent Lueckenhoff failed to respond. Tr. 104-07. Not eager to end their lucrative arrangement, [petitioner] paged Agent Lueckenhoff repeatedly and even followed Agent Lueckenhoff by car and pulled him over to extract a promise of future contact. Tr. 106-07. [Petitioner's] active pursuit of Agent Lueckenhoff and his reluctance to let go of a relationship built on payoffs reveal that he was more than simply a passive recipient of bribes.

Ibid.

The court of appeals affirmed petitioner's convictions. Pet. App. 13-16. After citing cases from other circuits

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[2] Petitioner also argued that the evidence failed to establish a pattern of racketeering activity to support his RICO conviction. Pet. App. 14-15. Petitioner does not renew that claim here.

holding that "inducement is an essential ingredient of the Hobbs Act offense," the court explained that "a system of payment in exchange for official acts can itself demonstrate inducement: there is an *implied* threat of unpleasant consequences for nonpayment, whenever payment is a way of life." Pet. App. 15-16. In any event, the court concluded, Seventh Circuit precedent did not require proof of an inducement for improper payments. Pet. App. 16.

ARGUMENT

1. The circuits are divided on the question whether extortion "under color of official right" within the meaning of the Hobbs Act, 18 U.S.C. 1951, requires proof that the defendant "induced" the offer of property that he received. The Second and Ninth Circuits hold that proof of inducement is required, see *United States* v. *Aguon*, 851 F.2d 1158, 1162-1167 (9th Cir. 1988) (en banc); *United States* v. *O'Grady*, 742 F.2d 682, 687 (2d Cir. 1984) (en banc), while most of the other circuits hold that it is not, see Pet. 7; Pet. App. 16.[3]

Whatever the correct construction of the statute, petitioner's conviction should stand because, as the district court held and the court of appeals implied, his conduct constituted inducement even under the minority interpretation of the Hobbs Act.

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[3] Although the opinion of the Sixth Circuit in *United States* v. *Jenkins*, 902 F.2d 467 (1990), can be read to adopt the inducement requirement of *O'Grady* and *Aguon*, see 902 F.2d at 467, that statement was dictum and conflicts with the court's initial observation that "a plausible argument can be made, although neither party makes it, that inducement is not an element of extortion under the Hobbs Act when the extortion is charged as obtaining property 'under color of official right,'" *id.* at 463.

The circuits that require proof of inducement recognize that such proof includes inducement implied by a series of transactions between the public official and the one paying for the official acts. Thus, while the Second Circuit in *O'Grady* held that "mere acceptance of benefits by a public official" cannot constitute extortion under color of official right, it added that the official need only do "something, under color of his public office, to cause the giving of benefits." 742 F.2d at 687. Accordingly, it is not necessary that the official expressly solicit a bribe or take some affirmative steps to instill fear in the person who pays it; the Hobbs Act is violated if the "public official *makes wrongful use of his office to obtain money* not due him or his office." *Ibid.*

Wrongful use of a public office includes inducement that can be communicated subtly through a series of exchanges. As the principal opinion in *O'Grady* acknowledged, "inducement can take many forms." 742 F.2d at 691. The concurring opinion of Judge Pierce in *O'Grady*, which was joined by a majority of the court, put the point more explicitly: "the jury should be permitted to infer inducement by the defendant based upon a finding of repeated acceptances over a period of time of substantial benefits (*i.e.*, benefits of a nature and magnitude which reasonably could affect a public official's exercise of his or her duties)." *Id.* at 694; see also *United States* v. *Tillem*, 906 F.2d 814, 821 (2d Cir. 1990); *United States* v. *Campo*, 774 F.2d 566, 568-569 (2d Cir. 1985) (per curiam).

Likewise, the Ninth Circuit in *Aguon* explained that an " 'inducement' can be in the overt form of a 'demand,' or in a more subtle form such as 'custom' or 'expectation' such as might have been communicated by the nature of defendant's prior conduct of his office." 851 F.2d at 1166.

Petitioner's conduct clearly constituted "inducement" as defined by those circuits that require such proof. See *United*

States v. *O'Grady*, 742 F.2d at 694; *United States* v. *Campo*, 774 F.2d at 568-569. The facts as found by the district court show that petitioner received a series of payments in exchange for information and protection. Continuation of those services was the implied inducement for petitioner's monthly retainer.

Petitioner offers a different explanation for his conduct, asserting that "[t]he government foisted the money upon him," Pet. 8, and that this case involves the "passive, uninduced receipt of money by a public employee," Pet. 11. The evidence, however, belies that interpretation, and the district court, sitting as the finder of fact, rejected petitioner's characterization. As the district court noted, petitioner agreed to perform a number of services in exchange for the periodic payments. Tr. 250. What is more, when Agent Lueckenhoff offered to pay him $300 per month, petitioner insisted that the amount be $500 per month. When the flow of payoffs stopped, petitioner repeatedly paged Lueckenhoff and even pulled him over one night on the street, inferably in an effort to induce Lueckenhoff to resume the payments. Thus, because petitioner engaged in conduct that would violate the Hobbs Act in any circuit, this case is not an appropriate one in which to address the question of the proper construction of the federal offense of extortion under color of official right.

2. Petitioner suggests that his Hobbs Act conviction may be affected by the decision in the pending case of *McCormick* v. *United States*, No. 89-1918 (argued Jan. 8, 1991). Pet. 11 n.*. *McCormick* involves the question whether the payments to the defendant in that case were legitimate campaign contributions, which fall outside the ambit of the Hobbs Act, or were instead prohibited payoffs. The payments to petitioner in this case clearly cannot be construed as legal under any version of the facts. Accordingly, and

because petitioner's conviction would be affirmed by every circuit that has addressed the issue, there is no need to hold the petition pending the Court's decision in *McCormick*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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